FOR ARGUMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, APPELLANT

v.

PATRICIA ILENE CLARK, GUARDIAN FOR
SHAWN D. CLARK AND TRICIA D. CLARK

ON APPEAL FROM THE
UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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1. Appellees suggest (Br. 34-40) that this Court need not reach the constitutional issue presented, because they satisfy the statutory lived-with requirement. They base this assertion on affidavits in the record indicating that they lived in a regular parent-child relationship with Isaacson until about 2 1/2 years before his death (A. 6-7). Appellees challenge the Commission's interpretation of the statute as requiring a showing that the residency requirement was met at the time of death. But that interpretation is entirely consistent with the fundamental purpose of the Civil Service Retirement Act—the replacement of support lost by the wage-earner's death. As we argue in our main brief (pages 27-31), Congress reasonably concluded that illegitimate children who were living with the wage-earner when he died were the ones

most likely to have lost support at his death.[1] Others, like appellees, who stopped living with the wage-earner several years before his death, are presumed to have lost support at that time and not at the time of death.[2]

2. Amicus Jenkins is in error in asserting (Br. 19 *et seq.*) that the Act impermissibly discriminates against illegitimate children. This is not a statute that totally denies benefits to illegitimates, or even one that applies different standards to all illegitimate than to all legitimate children. Instead, the statutory classification is based on the likelihood of support. Legitimate children, adopted children (whether legitimate or illegitimate), and those illegitimate children and stepchildren who were living with the wage-earner at the time of his death receive benefits; stepchildren and illegitimate children who were not living with the wage-earner do not. Stepchildren are treated exactly like illegitimate ones—their entitlement to benefits depends on whether they were living with the wage-earner at his death.

The congressional judgment that illegitimate children who were not living with the wage-earner at the time he died are substantially less likely to have been supported by the wage-earner than legitimate children in the same

[1]Appellees misinterpret the Commission's interpretation of the Act as requiring that they show that they were living under the same roof as the wage-earner at the moment of his death (Br. 18d, 39, 43, 51). As the Civil Service Board of Appeals and Review explained (A. 7), "periodic or temporary separation does not bar 'living with', [but] the circumstances must indicate that the child and parent have shared and again expect to share a common roof or resume a common residence when conditions permit."

[2]Appellees assert (Br. 11, 18e, 18g, 35, 46) that Isaacson in fact continued to support them. As we point out in our main brief (page 8 n. 9), that assertion is not supported by the record. It is, in any event, irrelevant. See *Califano* v. *Boles*, No. 78-808 (June 27, 1979), slip op. 2-3, 11.

situation is confirmed by a recent survey conducted by the Bureau of the Census. In a report issued in June 1979, the Bureau reports that "42 percent of currently divorced mothers with at least one child present in their homes received child support payments, compared to 26 percent of remarried mothers, 18 percent of separated mothers, and only 4 percent of never-married mothers." Bureau of the Census, U.S. Department of Commerce, *Divorce, Child Custody, and Child Support*, Special Studies Series P-23, No. 84, p. 4 (1979). Thus here, in contrast to *Jimenez* v. *Weinberger*, 417 U.S. 628, 634-635 (1974), the statutory classifications accurately reflect the likelihood of lost support; the means chosen by Congress are appropriately tailored to the end of replacing lost support.

3. Amicus notes that an estimated 10,000 to 22,000 illegitimate children are denied benefits by the challenged provision (Br. 28, n. 10). The census figures noted above indicate that the statutory conclusion that those children were not dependent on the wage-earner when he died is correct for 9,600 to 21,200 of those children and incorrect for only 400 to 800. Here, as in *Mathews* v. *Lucas*, 427 U.S. 495, 516 (1976), Congress' assumptions concerning dependency are "reasonably supportive of its conclusions that individualized factual inquiry in order to isolate each nondependent child * * * is unwarranted as an administrative exercise." Moreover, if the lived-with requirement were struck from the statute, the effect apparently would be to render the statute vastly over-inclusive, for the statute would then contain no dependency requirement for any illegitimate child.[3] In order to permit the 400

[3]The Court of Claims on motion for rehearing in *Gentry* v. *United States*, 551 F. 2d 852, 855 (1977), apparently assumed that the Commission could still require some showing of dependency for illegitimate children. Appellees (Br. 36, 55-56) and Amicus (Br. 27-29) repeat this assumption without identifying any statutory basis for the support requirement.

to 800 children who actually received some support from the wage-earner to recover benefits, thousands of children who received no support would also be added to the rolls. This problem would be avoided by the legislative proposal currently before Congress (Appellee's Br. App. B), which defines a child as "an unmarried dependent child" and specifies the situations in which a child is to be deemed dependent. The proposal advocated by OPM thus avoids the over-inclusiveness that would result from a judicial decision of unconstitutionality.

4. Amicus suggests (Br. 7-19) that the government's jurisdictional argument turns simply on the question whether the lived-with requirement is severable. But the determination that the provision is severable only raises the jurisdictional issue, it does not resolve it. Unless the provision is severable, the question of appellees' entitlement to retroactive benefits simply does not arise. Our claim is that even *assuming* the lived-with requirement is severable and that a district court could therefore appropriately award appellees prospective relief, they are not entitled to retroactive benefits, since they can point to no statute that " 'in itself * * * can fairly be interpreted as mandating compensation by the Federal Government.' " *United States* v. *Testan*, 424 U.S. 392, 402 (1976), quoting from *Eastport S.S. Corp.* v. *United States*, 372 F. 2d 1002, 1008, 1009 (Ct. Cl. 1967).

Amicus contends that the Act, with the offending provision "read out" of it, provides the necessary statutory authority (Amicus Br. 19; cf. Appellee's Br. 14-15). This claim assumes that once a court concludes that a portion of a statute is unconstitutional and severable, the statute must be read as if that portion had never been

included. But that assumption is incorrect.[4] The judicial gloss does not rewrite the statute—only Congress can do that. See *Califano* v. *Westcott*, No. 78-437 (June 25, 1979), slip op. 15. Instead, the court's decision means that the payments directed by the statute cannot constitutionally be limited to the statutory class, so that future payments must also include the class excluded by the statute.[5] It does not follow that retroactive payments must also be made to the excluded class.

Whether retroactive payments, which are in the nature of damages, may be judicially ordered is an entirely separate question. As we point out in our main brief (pages 17-24), the resolution of that question turns on whether there has been an explicit waiver of sovereign immunity permitting the court to award such benefits. The only conceivable waiver of sovereign immunity here, the provision for payment of benefits for up to 30 years after entitlement (5 U.S.C. 8345(h)(2)), was enacted to

[4]It is an assumption shared by the Court of Claims, which relied in *Gentry* v. *United States*, 546 F. 2d 343, 346 (1976), on *Norton* v. *Shelby County*, 118 U.S. 425 (1886), for the proposition that "[i]t is well established that an unconstitutional enactment is void *ab initio*." This Court has recently re-emphasized that, "[h]owever appealing the logic of *Norton* may have been in the abstract," the Court has abandoned its "principle of absolute retroactive invalidity" in favor of the realistic recognition that even unconstitutional enactments are hard facts that govern conduct until their unconstitutionality has been declared. *Lemon* v. *Kurtzman*, 411 U.S. 192, 198-199 (1973). Accord, *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374 (1940); O. Field, *The Effect of an Unconstitutional Statute* 91 (1935).

[5]As this Court emphasized in *Westcott*, the alternative remedy is to direct the agency to pay no benefits at all under the unconstitutional provision. Under Amicus Jenkins' analysis, the entire statute would then have been void *ab initio*, and in the absence of any other statutory authority to make payments to the designated beneficiaries, the payments would be subject to recoupment.

limit the period within which the benefits provided by the statute could be claimed. See S. Rep. No. 94-540, 94th Cong., 1st Sess. (1975). It would be ironic indeed to read that statutory limitation as the explicit waiver of sovereign immunity required by *United States* v. *Testan*, *supra*.

For these reasons, as well as those discussed in our main brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

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